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Supreme Court of the United States

OCTOBER TERM, 1957

WILLIAM H. BLACK and RUTH F. BLACK,
Petitioners,

v.

A. M. AMEN; H. C. WADLEIGH; ELLEN WADLEIGH; T. N. DANFORD; RUTH DANFORD; L. E. ROBINSON; MAUD ROBINSON; HAYS HALL; H. W. RILEY; GERALD C. BALDWIN; SPENCER J. BERGLUND; FRED O. BROWN; WILLIAM BROWN; VELMA BROWN; VERNON T. CLARK; GRACE CLARK; EDITH HALL; R. P. MCBRIDE; E. W. ROBINSON; MAUD T. ROGERS; C. F. RUNBOM; BEULAH RUNBOM; CLARENCE STEPHENS; NANCY STEPHENS; HOWARD D. STITES and LARRY STITES, infants under the age of twenty-one years, by LOIS L. STITES, their mother and next friend; KENNETH D. CONSTANT; HAZEL CONSTANT; J. B. SHERRARD; J. K. STEPHENSON; MYRTLE LUNDBLAD; MABEL LUNDBLAD; D. ARTHUR WALKER and FRED E. WINDISH, CO-RECEIVERS OF BLACK-MARSHALL OIL COMPANY, a corporation,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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NOVEMBER, 1957.

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Respondents attempt to circumvent consideration of the question on which this Court granted certiorari. This Court, they claim, was persuaded to grant the petition for certiorari on the "representation" that the litigation involved an action under Federal Rule of Civil Procedure 23(a)(3)—that is, an action in which there are tried together a group of separate and distinct

claims as to which there were common questions of law and fact and a claim to common relief. That the litigation involves this question seems to come as a complete surprise to them.

Unhappily this new-found position of respondents is squarely contrary to the one they have taken from the start of the litigation. From the outset they have asserted that intervention was justified, without satisfying jurisdictional requirements as to each intervenor, *because* this was a class action under Rule 23(a)(3). This view was adopted by the Court of Appeals. Whether or not Rule 23(a)(3) justifies this conclusion is the precise question in issue in this Court. Nowhere hinted, nowhere suggested, nowhere involved was respondents' latest suggestion that this is a class action involving claims to a common fund within the court's jurisdiction.

A second basis for federal jurisdiction now suggested—that a claim under federal law was alleged in the complaint—is argued for the first time in respondents' brief. It suggests, again, respondents' distaste for meeting the jurisdictional issue now before this Court for resolution.

Moreover, despite protestations against our characterization of the case as a "procedural muddle," we submit that respondents' new-found arguments confirm this to be the plain fact. For they show, perhaps more clearly than ever, that to dispose of this case demands the continued presence of the corporation, Black-Marshall Oil Company, as a party to this suit, and that a formidable task remains for the trial court once the applicable jurisdictional rule has been determined.

One further matter deserves brief comment—respondents' assertion that petitioner's Statement contained almost none of the facts necessary to an understanding of the claims involved in this suit. Based on this assertion, respondents have presented their own version of what transpired. Petitioner's statement of the case was drafted in the light of this Court's limitation of issues to the jurisdictional question. But, in view of disparaging references to petitioner's character and conduct which tend to color a technical argument, it is proper—indeed, in fairness, necessary—to state that the trial judge, who saw and heard petitioner and clearly recognized that he was telling the truth, expressly found that petitioner was not guilty of any fraud (R. 134); that respondents' stock interests in the company had been purchased in 1944 and 1945 for their full value (R. 132); and at a time when petitioner had no knowledge that his alleged agent, Ives, had misrepresented any facts to respondents (R. 126, 129, 130). As the court found, the subsequent increase in value of Black-Marshall shares resulted from an exceedingly successful drilling program and a sharp rise in the price of oil (R. 133). We must go further and insist, in view of respondents' statement that petitioner acquired a large interest in the company—32,000 shares—without consideration, that the trial judge found all of petitioner's shares, including the 32,000 shares, were properly issued for his interest in Kansas oil leases (R. 123). Moreover, all these transactions, including the issuance of these shares, were approved by corporate action at meetings at which respondents were well represented (R. 465-468; CR. 1718-1720; 1722-

1723; 1786-1800). In short, the record shows that petitioner Black, in fact, enabled all of these respondents to profit handsomely on their original investment.

I

RESPONDENTS' CLAIM IN THIS COURT THAT THIS IS A HYBRID CLASS ACTION INVOLVING INTERDEPENDENT CLAIMS TO A COMMON FUND IS IN DIRECT CONFLICT WITH THEIR POSITION IN BOTH COURTS BELOW, AND CANNOT BE RECONCILED WITH THE FACTS OF THE CASE AND THE APPLICABLE LEGAL AUTHORITIES.

Respondents' brief is devoted almost entirely to a claim—asserted in this Court for the first time in this suit—that the present litigation concerns interdependent claims to a fund in court, and that accordingly the intervening plaintiffs were not required to establish independent grounds for federal jurisdiction. Absent from respondents' brief is any attempt to meet the issue on which certiorari was granted, which is referred to only in a Parthian and somewhat obscure three-page "appendix". Understandably, therefore, respondents' sharp change of course has brought their new position into collision with their argument in both courts below (that this action was a class suit under Rule 23(a)(3)), with the facts of this case, and with the decisions governing class actions and ancillary jurisdiction in the federal courts.

A. *RESPONDENTS' POSITION IN THIS COURT IS CONTRARY TO THEIR POSITION IN THE COURTS BELOW AND TO THE DECISIONS OF THOSE COURTS.*

(1) At the time the District Court first considered respondents' motions to intervene as plaintiffs, counsel

for respondents explicitly stated in his opening comment on these motions that "this is a spurious class case under Rule 23."[1] In the course of his presentation, counsel reemphasized that respondents relied on Rule 23(a)(3) to intervene in this class action. He pointed out that, in respondents' view, the advantages of a Rule 23(a)(3) action were to toll the statute of limitations and to establish jurisdiction regardless of whether

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[1] The discussion of the motions opened as follows:

"The COURT: How about these motions of the other folks to intervene? Should the Court rule upon those, gentlemen?

"Mr. SMITH: I would like to be heard very briefly, Your Honor. If they are opposed, I am not sure, as things stand here, that they are opposed, we want to bring these other stockholders in in order that they can come in and get their rights as stockholders established and show specifically their reliance upon these misrepresentations. We think we have followed the rules here. I don't think I ought to take the time of the Court to make reference to these rules and discuss them categorically, but the same transactions are involved here, the two complaints are the same, the petition of intervention in the other, and we do ask the Court to grant that petition and we ask the Court to authorize our amendment and the reason, I may say, Your Honor, why we included in our motion requests for permission to dismiss these other defendants is this: The rules provide that where a class case is begun, and *this is a spurious class case under Rule 23*, that it may not be dismissed without consent of the Court and I think that that probably doesn't require the Court's action with reference to individual defendants, the dismissal of whom does not constitute the dismissal of the case, but to be safe we did ask the Court's authority in this motion to dismiss those defendants." Pp. 51-52 of Transcript of Proceedings held before the District Court for the District of Kansas on Sept. 25, 1950, taken by Harold Pittell, official reporter of the Court. A copy of the Transcript of these proceedings has been filed with the Clerk of this Court.

Unless otherwise indicated italics are supplied throughout this brief.

there was diversity.[2] Respondents' position is perhaps most clearly revealed in the following colloquy:

> "Mr. SMITH: May I begin this way, the intervening petition in every respect parallels the complaints, the amended complaints, in those two cases, so that they are setting up the same causes of action that are stated in the amended complaints in those cases. Now, why do they need to be filed and why do they need to be tried? Certain proceedings have been started in a representative case on their behalf. We interpret the decisions of the 10th Circuit to mean that the plaintiffs, the equitable stockholders who want to establish their right to restitution to their status of legal stockholders, must come in and prove their reliance upon the misrepresentations that they succumbed to and to proceed in the case as plaintiffs.
>
> "I refer to the Dunnett case and the Greer case, decided by Judge Phillips in this circuit. That is the way we interpret those decisions, as making it necessary for the individuals to pursue those rights.
>
> "Secondly, we are contending here, as held in the cases that I have just referred to, that a transaction of this kind constitutes a sale of assets and

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[2] As counsel succinctly put his view of the proceedings, if the respondents' intervening petitions were not granted, "they would lose the advantage of this filing here which has tolled the statute and it is because of the jurisdictional features and the tolling of the statute that is all the advantage you get under one of these spurious class actions under Rule 23, those two things, as I understand it." *Id.*, p. 62.

that the rights are corporate, but we are forced to recognize the possibility that some Court might hold, notwithstanding those cases, that it was the sale of stock and that all these rights here, in the final analysis, will be found to be individual rights of these stockholders. And it is for that reason that we have brought this so-called spurious class action under Rule 23 which permits us, as we respectfully think, to bring in all of these parties.

"Now, because that is a spurious class action, as we understand it, we get advantage of that as far as these other plaintiffs are concerned, only by tolling the statute and by establishing diversity as between the parties bringing the action and the defendants, and that they must come in and assert themselves their individual rights.

"The COURT: Does the rule use the expression 'spurious rights'?

"Mr. SMITH: No, it does not, sir. That is a word that has been injected into this by text writers on procedure and by the courts.

"The COURT: Well, if you have a class action you don't have to make everybody a party plaintiff or defendant, do you?

"Mr. SMITH: Well, Your Honor, it is our understanding that we cannot safely rely on these other plaintiffs being before the Court under such circumstances that they can recover unless they come in here and establish individually that they are entitled to have their stock back. There are cases to the effect that those are individual rights that they must establish for themselves.

"The COURT: So it wouldn't be a true class action?

"Mr. SMITH: And that is the reason I speak of it as coming under this paragraph which has been referred to as permitting so-called spurious class actions, where you don't get the whole value of complete representation, but you only get certain technical advantages such as tolling the statute and establishing jurisdiction for—as a matter of whether there is diversity or not.

"May I say, Your Honor, I don't think we ought to be put at the peril of trying to decide at this juncture whether we are right about that. We ought to be permitted to have them in here and let this thing proceed to a determination on its merits."[3]

(2) In a "Brief on Jurisdiction" filed by respondents in answer to petitioner's contention at a pretrial conference of March 7, 1952, that the District Court lacked jurisdiction, respondents again argued precisely the point which is now to be determined by this Court. They stated the issue to be as follows:

"The sole relevant question is whether other members of the class may intervene without an independent showing of jurisdiction where the representatives of the class who initiated the action have complied fully with the jurisdictional requirements." (p. 5)

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[3] *Id.* pp. 63-66.

Respondents' position on this question is the one which we challenge. According to respondents, who placed major reliance on Professor Moore and quoted his *Federal Practice* for support, the controlling principle was:

> "In a class action under Rule 23(a)(3), it is not necessary for the members of the class, intervening subsequent to the initiation of the action, to establish independent grounds of jurisdiction so long as the original plaintiffs meet the jurisdictional requirements." (*Ibid.*)

(3) On final briefing in the District Court the issue was again clearly drawn—it was the very issue which is still in the case and the question on which this Court granted certiorari. Petitioner first contended that each plaintiff sought redress for an alleged wrong to himself and that the action was not a class action since each plaintiff was interested only in his own recovery.[4] The brief went on:

> "Even if the case could be denominated as a class action, it would of necessity be a spurious class action under Rule 23(a)(3). In spurious class actions each claimant has a distinct and separate claim and there must be independent grounds for jurisdiction including diversity and the requisite jurisdictional amount. The spurious class action is purely a joinder device to allow the trial of many claims together which involve common questions of law and fact. The claims

[4] Brief for Defendants, p. 29.

> can not be aggregated to reach the jurisdictional amount. (Citations) Those who intervene in such an action already brought should also show independent grounds of jurisdiction. (Citations)"[5]

In reply, counsel for respondents argued in detail that the suit was an action under Rule 23(a)(3). They explicitly relied on Professor Moore to support the position that intervening plaintiffs need not establish independent grounds for diversity jurisdiction in Rule 23(a)(3) class actions.[6] And they quoted Professor Moore's further comment that the Rule 23(a)(3) class action has been useful in suits where large numbers of purchasers or holders of securities claim to have been defrauded by a defendant's common course of dealing. See 3 Moore, *Federal Practice* 3448 (2d ed. 1948) (the precise reference the Court of Appeals below relied upon in allowing plaintiffs to intervene without independently showing diversity of citizenship).

(4) The briefs in the Court of Appeals equally demonstrate that the basic jurisdictional dispute concerns the applicability of Rule 23(a)(3) to this action. Respondents described it thus:

> "In the present cases, substantially the same representations were made by the same individual with respect to the same transaction and at approximately the same time . . . [*t*]*he inquiry is whether* [*this case*] *presents common questions of law or fact* . . . All of the questions of law or

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[5] *Id.* p. 30.

[6] See Reply Brief for Plaintiffs and Intervenors, pp. 10-14.

fact regarding Black's liability are common questions . . . *The present cases, therefore, are clearly within* the authority of Rule 23(a)(3)."[7]

Petitioner continued to stress that this suit at best alleged individual frauds (which the District Court found petitioner had *not* committed) by the same person in a different manner and at different times. Accordingly, the litigation was not properly an action under Rule 23(a)(3), but was rather a series of separate suits in which each respondent's case "must stand on its own feet, with proper jurisdictional requirements timely alleged and thereafter proved."[8] Respondents go far beyond the limits of plausible interpretation in their attempt in this Court to twist this argument into a concession by petitioner that intervening plaintiffs in a Rule 23(a)(3) suit need not independently meet federal jurisdictional requirements. Petitioner, in urging affirmance of the careful factual findings of the District Court in his favor, limited his presentation on jurisdiction to his basic opposition to treatment of this litigation as a class suit. The subsidiary argument that jurisdictional requirements must be individually satisfied even if a class suit was involved was not conceded. Petitioner simply found it unnecessary to brief the point, which was encompassed within his basic position.

(5) The Court of Appeals itself, contrary to respondents' claim in this Court, recognized that the necessity for intervening plaintiffs to satisfy jurisdictional

[7] Appellants' Reply Brief, p. 4.

[8] Appellees' Brief, pp. 86-87.

standards was an issue in the action. The court below opened its opinion with this statement:

> "The first [claim] is a *spurious* action by the appellant stockholders of the Black-Marshall Oil Company . . ." (R. 441)

The court then discussed the jurisdictional question posed by the intervention of various plaintiffs in this spurious class action without alleging diversity of citizenship. It disposed of the issue in the following passage:

> "The original complaint alleged requisite diversity of citizenship and amount in controversy and these jurisdictional elements are unchallenged. The other appellants are either parties plaintiff or interveners in one of the consolidated actions over which the court had jurisdiction. And while their claims and demands were separate, they alleged substantially the same facts and sought common relief. The court's jurisdiction of the original claim was not impaired or impeded by the subsequent interventions, irrespective of citizenship or amount claimed. *Shipley* v. *Pittsburgh & Lake Erie Ry. Co.*, 70 F.Supp. 870; *Dickinson* v. *Burnham*, 2 Cir., 197 F.2d 973. The parties were multitudinous and the trial court commendably permitted them to join as plaintiffs or interveners in the several suits and consolidated the related litigation for trial and judgment as to each of the parties plaintiff or interveners. Indeed, this very situation was in the minds of the drafters when

Rule 23(a)(3) was adopted. See Vol. 3, Moore's Federal Practice, p. 3448." (R. 442)[9]

The conclusion is unmistakable. From the day the motions to intervene were first presented to the District Court through the final decision by the Court of Appeals, all parties recognized that this litigation concerned "separate and independent" claims which could, at most, permit a class action under Federal Rule

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[9] Apart from the clear language of the Court of Appeals demonstrating its recognition of the jurisdictional problem this action poses, the authorities cited by the Court of Appeals also indicate that it considered the jurisdiction question to be whether intervening plaintiffs need establish independent grounds for federal jurisdiction in an action under Rule 23(a)(3). The Shipley case cited by the Court below is perhaps a landmark decision supporting the view that intervention in a Rule 23(a)(3) class action may be had without regard to jurisdictional requirements. It is cited by Professor Moore in Volume 3 of his Federal Practice at page 3443, note 3, to uphold his argument that independent grounds for federal jurisdiction are unnecessary. And Professor Moore points to the Dickinson case, likewise cited by the Court below, for the same point in the supplement to his section discussing the jurisdictional issue in Rule 23(a)(3) actions. Professor Moore's erroneous interpretation of Dickinson—in fact a Rule 23(a)(2) action—as a Rule 23(a)(3) case is clear; but it is likewise clear that the Court below cited the Dickinson decision from the supplement to Moore's discussion of 23(a)(3) actions for the same point: that independent grounds of jurisdiction are not demanded of intervenors. That the Court of Appeals so employed the Dickinson and Shipley cases and decided the jurisdictional issue on which certiorari was granted is also confirmed by the Court's citation to Volume 3, page 3448, of Professor Moore's treatise. There, Moore expressly states, as respondents quoted in their District Court brief, that the Rule 23(a)(3) actions have been useful in cases where shareholders allege to have been defrauded of their corporate interests by a defendant's conduct.

23(a)(3). Respondents—contrary to their new position in this Court—insistently urged that this was a class action under Rule 23(a)(3) and that, under the thesis of Professor Moore, intervenors need not independently satisfy jurisdictional grounds. The Court of Appeals agreed with them, holding explicitly that this was a spurious class suit—that is, a Rule 23(a)(3) suit—and that therefore the interventions were properly allowed "irrespective of citizenship or amount claimed." The question presented in this Court squarely raises the issue of the correctness of this holding.

Putting to one side all of the foregoing, respondents now assert that this litigation involves interdependent claims to a common trust fund subject to the control of the court. Under this new view, the case now falls within Rule 23(a)(2), the "hybrid" category, and all of the claims of the intervenors now become ancillary to that of the original plaintiff, Amen.

As has been seen, respondents never took this view of the case in either of the courts below. The reason they did not is apparent.

B. *THIS CASE IS NOT A CLASS ACTION UNDER RULE 23(a)(2) AND IS NOT ONE IN WHICH THE CLAIMS OF RESPONDENTS CAN BE SAID TO BE ANCILLARY.*

Despite the new complexion which respondents would put on the case, it is clear that the courts below recognized that each of the plaintiffs was presenting a separate, distinct and individual claim for damages. The Court of Appeals, while holding that the litigation was properly brought as a class suit under Rule 23(a)(3) because plaintiffs alleged substantially the same facts and sought common relief, plainly recognized that

the claim of each plaintiff was separate and of like dignity, with none subordinate or ancillary to the other, and that each plaintiff must independently establish his claim. Thus the court specifically ruled that the six plaintiffs who did not appeal from the adverse judgment were no longer in the case (R. 452), and also explicitly held that one of the appealing plaintiffs, McBride, had not established his case and the dismissal as to him must therefore be affirmed (R. 453). With respect to the "successful appealing shareholders," it is equally clear that they were to be entitled to individual money judgments against Black. The court gave the following outline as to how such judgments were to be computed:

> "The successful appealing shareholders are entitled to money judgments against Black equal to the values of their equitable stock holdings in Black-Marshall sold to N.C.R.A. in 1947, less sums already received for such interests.
>
> "To determine the amount each successful appellant is entitled to recover, the trial court should apply in essence, the following formula: First, inquiry must be made to establish the number of validly issued shares of stock involved in the 1947 sale. Then, the value of each valid share so participating should be obtained by dividing the total dollar consideration paid by N.C.R.A. for the Black-Marshall assets by the number of such validly issued shares. Each shareholder is then entitled to judgment equal to the number of shares fraudulently procured by Black, less the amounts paid by Black to each shareholder in the fraudulent 1944-1945 transactions.

> "Validly issued shares involved in the 1947 sale must include any shares arbitrarily retired by Black prior to such sale, and of course must exclude the stock fictitiously issued, inasmuch as such fictitious issue is not entitled to share in the sale proceeds. And, the trial court in making these determinations should keep in mind that the overall object in view is to ignore any superficial book transactions and compensate appellant-stockholders in relation to their actual interests in the 1947 sale as evidenced by the number of shares fraudulently procured from them." (R. 460)

Under this portion of the decision each successful respondent is entitled to be considered an equitable stockholder (or, perhaps, a legal one) at the time of the 1947 sale.[10] He is said to be entitled to share in the purchase price in an amount equal to the ratio of the number of his shares to the total number of validly outstanding shares. In determining this latter figure, the court directs that some 32,000 of the shares issued to Black be cancelled,[11] and that "any shares arbitrarily retired by Black prior to such sale" (in 1947) be reinstated. When these corrections have been made, the amount of each successful respondent's recovery is determined by a simple mathematical computation. This amount is, as we have said, fixed.

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[10] The court below in another portion of its opinion stated that respondents "ceased to be either legal or equitable stockholders" (R. 454).

[11] The figure of 32,000 shares is referred to for identification purposes only. Even under the theory of the Court of Appeals, a maximum of less than 29,000 shares is involved.

Because proof is required to determine a preliminary fact—*i.e.*, the total number of shares at the time of the sale determined as directed by the court—respondents jump to the totally unwarranted and unconnected conclusions that respondents' claims are "interdependent" and that they are "claims to a common fund." The first conclusion comes from associating as identical two conceptions which are quite different. The conception that the total amount of stock outstanding must be corrected is regarded as synonomous with the conception that the ratio of each plaintiff's stock to the corrected total depends upon—*i.e.*, is determined by—the success or failure of his co-litigants in this case. The second conclusion—that there is a common fund to be divided—does not even have an intellectual basis. It is unsupported assertion.

Let us first consider the court's direction that, in recomputing the total outstanding shares, some 32,000 shares issued to Black must be excluded. This involves a simple operation in cancellation and subtraction, unaffected by the status of any respondent. There is no interdependency here.

As for the determination of the number of "validly issued" shares involved in the 1947 sale, this also is a figure which does not depend on the number of plaintiffs or intervenors in this action and their success or failure in this litigation. It depends upon proof—proof from which the District Court must decide which of the shares retired should be considered to have been validly outstanding at the time of the 1947 sale. At the time of the sale in 1947 there were other shareholders beside Black and those involved in this case.

Prior to the sale, shares of persons other than those here involved had been retired. Some of these persons have begun other actions; more have not.

Furthermore, not all of the shares sold by plaintiffs and intervenors here were retired. According to respondents themselves, 13,590 of these shares were still outstanding in 1947.[12] Clearly, then, the success of respondents equitably entitled to 13,590 shares will not affect in any way the amount of "validly issued shares."

But this is not the only mathematical fallacy in respondents' assertion. Many thousands of shares were retired which never belonged to plaintiffs or intervenors in this action.[13] If any of these be counted as "validly issued shares" as of the time of the sale, the total number of such shares would be increased by a factor having nothing to do with the success of these respondents.

Respondent's theory that there is a fund to be divided into as many portions as there are successful litigants here is not only factually and mathematically wrong, not only contrary to the opinion of the Court of Appeals, but is wholly inequitable. This is not a case of playing for a pot where the winner takes all; and the fewer the winners, the greater the take. Each respondent under the decision below is to recover the entire amount which such person lost and petitioner

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[12] This is the difference between the total number of shares sold by the plaintiffs and intervenors in this action, 47,196 (CR. 1887) and the number of these claimed to have been "arbitrarily retired", 33,606. Resp. Brief, p. 27.

[13] See Exhibit E-1, CR. 1928.

gained from him. Under respondents' view, as illustrated by the table on page 27 of their brief, if Amen were the sole successful plaintiff, the number of "arbitrarily retired" shares to be reinstated would be 80 and the per share value at liquidation would be $81.56, whereas if all claims in this litigation had been upheld, the value at liquidation would be $48.66. Both the error and the injustice of this conclusion are at once evident. The total number of "validly issued" shares at liquidation is a fact to be determined. It does not depend on who, or how many, sue or where they sue. It depends upon proof.[14]

In determining the fact from the proof, a court must decide the number of "validly issued" shares at the time of liquidation. This does not mean that all the claimants have to join with Amen in bringing a single suit, or that they could do so if they could not independently satisfy the jurisdictional requirements to bring their own claims into the federal courts. As in any number of other litigations involving money judgments, facts that go beyond an individual plaintiff's

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[14] It might be that the trial court in making the determination as to the number of "validly issued" shares would, on the basis of the proof before it, take a simple course. It could, for example, conclude that all shares retired by the single corporate action were to be considered "validly issued". On the other hand, the trial court could determine that, for the purpose of a formula for per share recovery, only the shares of the successful respondents would be added to those considered as "validly issued". Even if the trial court were to follow this procedure, which as seen above is both illogical and inequitable, this still does not make the claims interdependent or provide a fund to be divided among the successful litigants here.

interest must be considered in working out the recovery —here the amount per share—to which he is entitled. This can be done, and should be done, by the trial court in a case involving a single plaintiff, just as it would be done if three or four or twenty plaintiffs were involved in a single case.

Once determined by the trial court, and not until then, the number of "validly issued" shares is a fixed figure. It does not, as respondents contend, turn on the number of successful plaintiffs in this litigation. Each of the respondents here had an independent claim, and each was entitled to bring his own action against petitioner. If other plaintiffs chose to join in the litigation under Rule 23(a)(3), each nonetheless was asserting his individual claim that he was defrauded.

It was solely the choice of an individual whether to join in this litigation. Other individuals could, and in fact some did, choose to bring their own individual suits against petitioner.[15] Many stockholders, deciding that no legitimate basis existed for questioning the sale of their Black-Marshall holdings, did not sue. Whatever course any individual determined to take, he had to plead and prove his own independent cause, *i.e.*, that petitioner was responsible for false representations made to him and on which he reasonably relied to his detriment.

But regardless of who might or might not have sued, and in what courts, the number of validly issued shares

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[15] Two other suits by single individuals, also former stockholders of Black-Marshall Oil Company, are pending in the same Federal District Court where this case was tried: Blazer v. Black, Civil Action No. 3467, and Ranney v. Black, Civil Action No. 5481.

at liquidation is a fact to be determined like any other fact. In this determination some shares once owned by plaintiffs and intervenors will be reinstated; some will not, because the shares were never cancelled. The same may be said of the shares of others not involved here. To contend in this situation that the claims of the parties in this suit are interdependent is without any foundation whatever. The truth is that the same proof may in some instances affect both the failure or success of parties to this suit, and also the number of validly issued shares—or it may not. In this situation, it cannot be said that because the same proof may affect the determination of a mathematical fraction which in turn, enters into the computation of the recovery on separate claims, the claims are therefore interdependent.

C. *HERE SEPARATE CLAIMS OF FRAUD ARE TRIED TOGETHER BECAUSE "A COMMON QUESTION OF LAW OR FACT" IS PRESENTED AND "A COMMON RELIEF IS SOUGHT" UNDER RULE 23(a)(3).*

This litigation falls directly into the pattern of those cases in which persons claiming to have been defrauded of stock or other corporate securities can unite to sue in a class action under Rule 23(a)(3). A long line of decisions, including those relied on by respondents in both lower courts, confirm that, both before and after the promulgation of the Federal Rules, situations such as the present one were always recognized as involving individual interests which neither claims of fiduciary relationship nor of proportionate or interdependent interests in recoveries could make into "hybrid" class actions. In addition to *Steele* v. *Guar-*

plaintiffs are cotenants or the like. (Citations) It is true that the bill charged that the defendant was in a fiduciary relationship to each of the former noteholders and that he dealt with them without disclosing information which would have influenced their sales to him; but a separate wrong was committed against each noteholder when the defendant dealt with him without disclosing the facts, and each transaction was in reality the basis for a separate suit, depending for its outcome upon how much was disclosed to the noteholder in question. . . . *Nor is there any single fund in which all must share; on the contrary, the trust fund is separable, and* [*defendant*] *must hold all that he made on resale of each note as constructive trustee for the defrauded holder of that note. The defrauded noteholders had no common fund.* . . . [Plaintiff's] suit was a 'spurious class suit', and the decree does not bind those who are not parties. . . ." (48 F. 2d at 14)

The point was made with equal clarity in *Miller* v. *National City Bank,* 166 F. 2d 723 (2d Cir. 1948). There plaintiff alleged that he and other bondholders had been defrauded by false representations which prevented them from instituting their claims for payment until the statute of limitations had run. The court disposed of the claim that plaintiff was entitled to an accounting for a fund in the following terms:

"Appellant seeks to distinguish the case [Hackner v. Guaranty Trust Company, 117 F. 2d 95] by saying that he is not seeking damages, but

an accounting for the entire fund. Nevertheless, regardless of his prayer, his action still sounds in fraud. In order to recover he must show not only the misrepresentations but also reliance on them. Reliance is a factor personal to each participant. A judgment holding appellant had or had not relied on misrepresentations would not bind appellee in a suit by another participant. The case, therefore, falls under the category of a 'spurious' class suit, and there can be no aggregation of claims." (166 F. 2d at 728)

Likewise, because this action concerns individual frauds having no relation to a common fund, the concept of ancillary jurisdiction cannot be invoked to sustain intervention without each intervenor independently meeting federal jurisdictional requirements. Ancillary jurisdiction may exist where a plaintiff representing a class proves the cause of action determinative of the claims held by other members of the class. Thereafter, other members may intervene without the necessity of proving jurisdictional facts in order to claim their portion of a fund out of which all claims are to be satisfied.

The basic principles of ancillary jurisdiction, where a fund drawn into the court's custody is made the basis for its jurisdiction over claims of intervening parties seeking an interest in the property, were announced in *Hoffman* v. *McClelland*, 264 U. S. 552, and *Fulton National Bank* v. *Hozier*, 267 U. S. 276. But even in these landmark cases, this Court refused to allow intervention, without meeting jurisdictional re-

quirements, by parties claiming against the defendant under separate and individual transactions having nothing to do with a particular fund.

Creditors' bills brought by one or more but less than all creditors of a defendant to set aside a fraudulent conveyance and appoint receivers are perhaps the most common illustrations of ancillary jurisdiction. See, *e.g.*, *Stewart* v. *Dunham*, 115 U. S. 61, and *Handley* v. *Stutz*, 137 U. S. 366. Similarly, the decision in *Dickinson* v. *Burnham*, 197 F. 2d 973 (2d Cir. 1952), *cert. denied*, 344 U.S. 875, so strongly relied upon by respondents, is a good example of a "fund" decision analogous to suits by creditors. But respondents cannot avoid the plain fact that the present action differs sharply from the *Dickinson* case and that a Rule 23(a)(3) proceeding is involved here.

In the *Dickinson* case, the basic question involved was whether the alleged wrongdoers had improperly utilized a subscription fund. The claims were brought by two of the subscribers on behalf of the group. There was no question of individual frauds committed against these particular subscribers. The only issue was whether the claimed wrongdoers had fraudulently misused the subscription fund as against all subscribers. The court's decision was that they had, and this established the right of all subscribers to the fund to recovery.

In sharp contrast, we are concerned here with separate frauds alleged to have been committed against individuals. If one respondent prevails in his view that he was defrauded by petitioner, it brings no common fund in court and establishes no right of any other respondent. In *Dickinson* the claimants were

establishing the rights of all subscribers to share in a fund. In the present litigation each claimant was establishing solely his own separate and distinct right to redress for an individual claimed fraud. The nature of the *Dickinson* case was specifically recognized by the court, which pointed out that no one suggested or claimed a right to "full recovery from [the wrongdoer] as on an ordinary tort liability for conspiracy and defrauding" (197 F. 2d at 980).

If the *Dickinson* case were to be distorted as respondents urge, all claims for separate and individual frauds, which have been uniformly recognized as involving suits under Rule 23(a)(3), would become hybrid class actions. The concepts of ancillary jurisdiction would be radically expanded to bring innumerable local law cases into the federal courts. Indeed, any notion that the *Dickinson* case could be used to authorize alleged victims of a fraud to label the fruits of the individual wrongs a "fund", in order to maintain a hybrid action, was dispelled by the Court of Appeals for the Second Circuit in a later opinion, *Rock Drilling, Blasting, etc.* v. *Mason & Hanger Co.*, 217 F. 2d 687 (2d Cir. 1954), *cert. denied*, 349 U. S. 915. There a complaint was brought on behalf of some 400 union members for damages sustained as a result of a conspiracy to bribe an officer of their international, but was dismissed *inter alia* for failure of any one member to show the requisite jurisdictional amount. Even the willingness to reduce the amount of aggregate damages to a sum equal to the amount of the bribe itself could not change the spurious nature of the class action:

"By asserting 'unjust enrichment' in the amount of the bribe, reducing the ad damnum clause from $600,000 to $36,000, as 'at least' the amount of the aggregate damage, and calling this a 'fund' to which plaintiff [union] is entitled 'as trustee,' plaintiff has merely added verbiage. There is no fund. The claim remains one on behalf of 400 separate individuals for the damage suffered by each due to the alleged tortious conduct of defendant....

* * *

"... what is plainly a series of separate and distinct claims cannot be transmuted into 'a single title or right' by the mere expedient of asking for less damages than each would be entitled to were he to have sued alone and casting the prayer for relief in the form of a declaratory judgment proceeding affecting the disposition of a so-called 'fund'." (217 F. 2d at 695)

In this litigation, the claim of each respondent is separate and distinct. Only because common questions of law or fact are involved and common relief is sought may their cases be tried together. Respondents fully recognized in the courts below that this was necessarily so under the applicable authorities. The issue which was controverted was whether individual jurisdictional requirements could be disregarded in this type of action. As we have seen, respondents argued they could be. They prevailed in the court below in this view. Petitioner, for the reasons given in his original brief, submits that there is no basis for so neglecting

the established limitations on federal jurisdiction, and that this Court should resolve the question by determining that intervenors must severally meet federal jurisdictional requirements.

II

RESPONDENTS' CLAIM THAT ONLY THE CITIZENSHIP OF A FEW PLAINTIFFS IS INVOLVED DISREGARDS THAT THE CORPORATION MUST BE A PARTY-DEFENDANT, THUS DESTROYING DIVERSITY FOR ALMOST ALL PLAINTIFFS.

Respondents seek to minimize the importance of the basic jurisdictional issue on which certiorari was granted by claiming that only the citizenship of two plaintiffs, Mr. and Mrs. Constant, is not diverse from that of the defendants. In this manner, respondents avoid discussion of whether Black-Marshall Company is a necessary party-defendant in this action, contenting themselves with the comment that the Court of Appeals

> "held that respondents' right to have the 32,000 odd shares fraudulently issued to Black excluded from participation in the proceeds of the sale was *not* sustained as a corporate claim but was one inhering in the former stockholders as beneficiaries of the trust (R. 454-55)." Resp. Brief at 57.

As a matter of fact, respondents asserted a claim to these 32,000 shares only on behalf of the corporation and adhered to this position throughout the proceedings below. The Court of Appeals itself recognized that respondents made only a corporate claim to such shares (R. 455). Since any contention made relative

to the 32,000 shares was made solely as a corporate claim, there was no issue before the Court of Appeals pursuant to which it could grant an individual recovery with respect to these shares. *Cf. Howard* v. *Furst*, 238 F. 2d 790, 793 (2d Cir. 1956), *cert. denied*, 353 U. S. 937. Respondents' claim is therefore a mere matter of words. If the relief granted by the Court of Appeals is viewed in a practical light, the corporation must be joined as a party-defendant in this action.

Nor is discussion of this important question foreclosed by the limited grant of certiorari. Quite obviously, decision on whether or not the corporation is a party is vital to the final outcome of this suit, after this Court's determination of the basic jurisdictional question.

Respondents are seeking to cancel shares of the corporation issued to Black and to reinstate shares of their own alleged to have been fraudulently cancelled. This, apparently, is how the majority below viewed the effect of its decision, for the formula it announced to measure petitioner Black's liability demands consideration of which shares were "validly issued" and which were "arbitrarily retired" (R. 460). The shares respondents would cancel are those issued to Black as his part of the 64,000 the District Court found to have been payment for the five Kansas leases Black and Deering Marshall contributed to the corporation (R. 123). The shares to be reinstated are those retired by the corporation after they had been purchased in 1944 and 1945 at a price representing their then true value (R. 132). In both instances, of cancellation and reinstatement, respondents demand the doing of an act by the corpora-

tion. This is true regardless of how respondents have endeavored to frame their complaint or request for relief.

If, then, this suit involves cancellation or reissuance of shares, the necessity of Black-Marshall Company's participation as a party is not open to doubt. This Court declared over 75 years ago in *Kendig* v. *Dean*, 97 U.S. 423, that a corporation is an indispensable party in any suit to cancel shares of its stock. This ruling was re-affirmed in *Crump* v. *Thurber*, 115 U.S. 56, and *St. Louis & San Francisco Ry.* v. *Wilson*, 114 U.S. 60. Similarly, this view has been widespread in decisions of state tribunals. See, *e.g.*, *Bruschke* v. *Chicago Schuetzen Verein*, 145 Ill. 433, 34 N.E. 417 (1893); *Campbell* v. *Morgan*, 4 Ill. App. 100, 105 (1879); *Mitchell* v. *Beachy*, 110 Kan. 60, 202 Pac. 628 (1921); *Muellhaupt* v. *Strawbridge Estate*, 298 Pac. 189 (Ore. 1931). Courts require the corporation as a party to such actions for several reasons. First, the relief sought necessitates a corporate act—cancellation of stock on the corporation's books; the corporation's records are unavoidably affected. A further reason is that the corporation must be bound by the judgment rendered disposing of its stock. The judgment could not run against the corporation unless it were a party. And, not being bound, the corporation could later, on its own or through other stockholders, sue the defendant again were it dissatisfied with the first judgment. Were the corporation not a party, the first judgment would have no *res judicata* effect as to it. See, *e.g.*, *Dean* v. *Kellogg*, 294 Mich. 200, 292 N.W. 704 (1940); *Turner* v. *United Mineral Lands Corp.*, 308 Mass. 531, 33 N.E. 2d 282 (1941).

In their sparse discussion of these issues respondents make an elliptical footnote reference to the fact that the receivers have been active plaintiffs in this litigation (Resp. Brief, p. 57, n. 23). This is no answer to petitioner's claim that the corporation must be a party in order to insure that the interests of *all* stockholders—not only the plaintiffs—and, indeed, the interests of petitioner be protected. Furthermore, it is obvious the receivers cannot perform this function.

Most significant is the fact that the receivers cannot properly represent the corporation, for their part in the litigation in the courts below and in this Court conclusively shows that they cannot adequately represent all the former stockholders of Black-Marshall Oil Company. As respondents themselves acknowledge, the receivers were appointed at the instigation of the original plaintiff, Amen, immediately after he instituted suit (R. 370). Since their appointment, they have allied themselves completely with the respondents. Their complete identification in interest with the respondents is best illustrated by the continued presence, as counsel for respondents in this Court, of one of the receivers himself, despite the fact that the Court of Appeals dismissed the receivers' claims (R. 455) and, not having petitioned for review, they no longer have any place in this suit. In fact, despite the receivers' being out of the case, all three counsel who appeared solely for them in the courts below are still actively litigating the issues here as counsel for respondents. Obviously, these admittedly partisan interests cannot serve to represent the corporation and all of its stockholders.

Given these facts, petitioner maintains that Black-Marshall must be a party to this suit and properly is a party-defendant. Since the receivers cannot be its proper representatives, the corporation becomes aligned as a party-defendant. Under the Court of Appeals decision, shares of the corporation are to be cancelled and others revalidated. In this situation, the corporation must be aligned as a party-defendant in accord with the settled rule established as early as *Davenport* v. *Dows*, 18 Wall. 626, and reaffirmed most recently in *Smith* v. *Sperling*, 354 U.S. 91. Once this is done, federal diversity falls, since an alignment of parties would place citizens of Illinois on both sides of the controversy.

III

THERE IS NO SUBSTANCE TO THE CLAIM THAT FEDERAL JURISDICTION OVER THIS ACTION CAN BE SUSTAINED ON THE GROUND THAT A FEDERAL CAUSE OF ACTION WAS ALLEGED.

To create an alternative basis for federal jurisdiction, respondents argue that, entirely apart from diversity of citizenship, jurisdiction of the federal court in this case is founded upon the existence of a federal question. This is based on respondents' new claim that petitioner's actions violated Rule X-10B-5 of the Securities and Exchange Commission issued under Section 10(b) of the Securities Exchange Act of 1934.

Even if it be assumed that respondents' District Court complaint alleged an action under Rule X-10B-5 —which, as seen below, is simply not the case—this

latest of respondents' new positions is extremely flimsy. There is no basis for saying that the allegation of some federal claim—never litigated, referred to or considered after initial allegation in the complaint—can support federal jurisdiction over an action involving state law and where federal jurisdiction is grounded solely on diversity. The authorities cited in respondents' brief on this point, such as *Hurn* v. *Oursler*, 289 U.S. 238, all concern situations where a federal cause of action, which was also joined with a non-federal cause of action, had been actively litigated. In each proceeding, the federal cause was either of primary importance or of equal importance with the state cause as a ground for recovery, and in all of these cases the federal cause had been diligently pursued. The principles applied in these decisions thus have no application in this suit.[17]

Here, there was not even an express allegation, let alone a count, describing a federal action. Although respondents now mention that an allegation in the amended complaint was "based upon" Rule X-10B-5, the Rule itself and Section 10(b) of the Securities Exchange Act of 1934 (pursuant to which the Rule was issued) were not even referred to in the amended complaint. Indeed, the first time that they have been mentioned in this case is in respondents' current brief in this Court. The only reference to the Securities Ex-

[17] To support federal court jurisdiction of a claim alleged to be under a federal statute, the statute involved must be an essential element in plaintiff's cause of action. The cause must basically and necessarily concern the federal act; the statute must not be a collateral element or of mere possible interest. See, *e.g.*, Gully v. First Nat'l Bank, 299 U. S. 109; Howard v. Furst, 238 F. 2d 790 (2d Cir. 1956), cert. denied, 353 U. S. 937.

change Act of 1934 in the entire history of this proceeding is found in a list of statutes cited in a single paragraph of the amended complaint.[18]

Respondents not only failed to allege a federal action in their complaint, but they in no way alluded to a federal cause of action at trial, in their briefs, in their proposed findings submitted to the trial court,[19] or in any consideration of the case in the Court of Appeals. They assert now, for the first time, that jurisdiction is based on a federal cause never alleged, never briefed and never argued. The plain fact is that this case was tried as, and is, a diversity case, in which the respondents' claims should have been measured by Illinois law where the purported representations took place.

This Court, in *Niles-Bement-Pond Co.* v. *Iron Moulders Union,* 254 U.S. 77, characterized a similar belated attempt to raise a federal question on which jurisdiction may be founded "as an afterthought" which would

[18] The paragraph in the amended complaint lumped together citations to the Federal Securities Act of 1933, the Securities Exchange Act of 1934, a section of the Federal Criminal Code, and citations to state securities acts.

That respondents never really thought a federal claim was in the case is illustrated by the fact that not until a few weeks ago did they suddenly discover that even this single reference to the Securities Exchange Act of 1934, in the bunching with citations to other federal and state statutes, had been omitted from the printed record in the Court of Appeals and in this Court. They thereupon found it necessary to file a motion on October 26, 1957 to correct the record.

[19] Plaintiffs' only requested finding on jurisdiction was that the single original plaintiff, Amen, was a citizen of South Dakota and thus had diverse citizenship with defendants. No claim was made that jurisdiction was based on a federal question of any kind (R. 96).

not be accepted. There, in a diversity case, the Court rejected plaintiff's allegations that a contract cause of action arose under a federal statute as "much too casual and meager to give serious color to the claim now made that the cause of action asserted is one arising under the laws of the United States." See also *Robinson* v. *Anderson*, 121 U.S. 522; *Blumenstock Bros. Advertising Agency* v. *Curtis Pub. Co.*, 252 U.S. 436, 441.

Here, respondents cannot even spell out a colorable claim that a federal cause of action was actually involved. The claim can hardly be dignified as even being "an afterthought," and is completely without substance.

CONCLUSION

The respondents sought to take advantage of the so-called "spurious" class suit under Rule 23(a)(3) to bring this litigation into the federal courts. As we have emphasized, the use of this permissive joinder device in an effort to extend the jurisdiction of the federal courts over what are essentially local law questions runs afoul of federal jurisdictional requirements. It is a source of confusion and mischief. This Court limited its grant of certiorari to this basic jurisdictional question. Respondents, seeking to avoid determination of this question, devote their brief to new contentions contrary to those they advanced in the courts below. These belated arguments cannot be sustained under the principles which govern this litigation.

Respondents' refusal even to attempt to support the decision of the Court below on its jurisdiction seems a

recognition by respondents themselves that it was wrong and cannot be supported.

For the reasons stated here and in petitioner's main brief, which stands unanswered, we respectfully submit that the judgment of the Court of Appeals should be reversed with direction that the case be remanded to the District Court to determine, after proper alignment of necessary parties, which claimants meet the controlling jurisdictional rule—that each claimant must independently satisfy federal jurisdictional requirements.

Respectfully submitted,

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NOVEMBER, 1957